

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAN 10 2000

PATRICK FISHER
Clerk

GARY MONTOYA,

Petitioner-Appellant,

v.

TIM LEMASTER, Warden;
ATTORNEY GENERAL OF THE
STATE OF NEW MEXICO,

Respondents-Appellees.

No. 99-2071
(D.C. No. CIV-97-526-JP/JHG)
(D. N.M.)

ORDER AND JUDGMENT *

Before **EBEL**, **KELLY**, and **BRISCOE**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

On March 11, 1994, petitioner Gary Montoya was convicted by the State of New Mexico of two counts of criminal sexual penetration of a minor. The conviction was affirmed on direct appeal. Petitioner filed his petition for habeas relief under 28 U.S.C. § 2254 on April 27, 1997, which was denied. Petitioner appeals. The district court denied petitioner a certificate of appealability. We construe petitioner's notice of appeal as a renewed application for a certificate of appealability. See Fed. R. App. P. 22(b).

Petitioner argues that prosecutorial misconduct deprived him of due process. He asserts that the prosecutor: (1) improperly disclosed his prior child sexual abuse offense during cross-examination of his wife; (2) improperly attempted to portray him through cross-examination of his wife and in closing argument as a depraved pedophile; (3) improperly questioned witnesses concerning the credibility of other witnesses; and (4) made improper comments in closing argument.

The district court adopted the magistrate judge's recommendation to deny habeas relief. The district court emphasized "that the prosecuting attorney's questions and statements did not clearly or explicitly disclose Petitioner's prior offense or portray him as a 'depraved' pedophile." R. doc. 23.

We have carefully reviewed the parties' materials. We are unpersuaded by petitioner's assertions of error, and deny his application for a certificate of

appealability for substantially the same reasons as those set forth in the magistrate judge's August 28, 1998 recommendation and adopted by the district court in its December 29, 1998 order.

Petitioner's application for a certificate of appealability is denied, and the appeal is DISMISSED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge